Decision 03-11-025 November 13, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	R. 93-04-003 (Filed April 7, 1993)
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	I. 93-04-002 (Filed April 7, 1993)
Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	R. 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's On Motion Into Competition for Local Exchange Service.	I. 95-04-044 (Filed April 26, 1995)

ORDER MODIFYING DECISION 02-12-081 AND DENYING REHEARING OF DECISION AS MODIFIED

In this decision, we dispose of rehearing applications concerning our Decision (D.) 02-12-081. We modify D.02-12-081, as discussed in this decision. Rehearing of D.02-12-081, as modified, shall be denied.

I. BACKGROUND

In D.02-12-081, we granted Pacific Bell Telephone Company ("Pacific") authority to provide long distance or intrastate interexchange service in California. Pacific is a former Bell Operating Company ("BOC") and is currently an affiliate of SBC Communications ("SBC").[1] Pursuant to a federal settlement which led to the break-up of

[1] Pacific's former parent company, Pacific Telesis, merged with SBC and, currently, Pacific goes by the name SBC California. However, in this order, we refer to Pacific because we used that name in D.02-12-081.

AT&T in 1984, BOCs were initially prohibited from competing in the instate long distance market. However, the Telecommunications Act of 1996 ("Act") removed this restriction and allowed BOCs to offer intrastate long distance service as long as they meet certain requirements, including fourteen provisions or "Checklist Items". (47 U.S.C. § 271.) The Act also requires that the Federal Communications Commission ("FCC") consult with state public utilities commissions on the issue of whether a BOC has met the Checklist Items. (47 U.S.C. § 271(d)(2)(B).)

In 1999 and 2001, Pacific submitted compliance filings to the Commission in support of a motion that it had satisfied the requirements of Section 271. On September 19, 2002, we issued D.02-09-050, in which we found that Pacific met twelve of the fourteen Checklist Items. In D.02-09-050, we also addressed whether Pacific met four requirements set forth in Public Utilities Code ("Pub. Util. Code") section 709.2(c).[2] This section provides:

> No Commission order authorizing or directing competition in intrastate interexchange telecommunications shall be implemented until the commission has done all of the following, pursuant to the public hearing process:
>
> (1) Determined that all competitors have fair, nondiscriminatory, and mutually open access to exchanges…and interchange facilities, including fair unbundling of exchange facilities…
>
> (2) Determined that there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or unfair use of customer contacts generated by the local exchange telephone corporation's provision of local exchange telephone service.
>
> (3) Determined that there is no improper cross-subsidization of intrastate interchange telecommunications service by requiring separate

[2] All unidentified section references are to the Public Utilities Code.

accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs.

(4) Determined that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.

(Pub. Util. Code § 709.2(c).) In D.02-09-050, we concluded that Pacific met the determination mandated by section 709.2(c)(1). We found that Pacific demonstrated that "it has provided substantially fair, nondiscriminatory, open access to exchanges, including fair unbundling of exchange facilities" and that we had "sufficient data to determine the openness of Pacific's network". (D.02-09-050, p. 244.)

With respect to section 709.2(c)(2), in D.02-09-050 we imposed certain marketing requirements on Pacific, in addition to those set forth in Pacific's Tariff Rule 12[3], in order to address concerns with respect to Pacific's proposed joint marketing activities. We prohibited Pacific from marketing its optional or affiliate services during a new phone line installation unless the customer specifically requests this service. Also, we required that Pacific inform customers of their right to select a long distance carrier of their choice, prior to stating that Pacific also offers long distance service through its affiliate, Pacific Bell Long Distance ("PBLD"), and provide customers with an opportunity to select an alternate long distance provider. Further, we adopted language to be included in joint marketing scripts. In D.02-09-050, we stated that the record "does not support the finding that there is no possibility of anticompetitive behavior" by Pacific in the future but also found that regulatory enforcement of our rules and oversight of

[3] Pursuant to Pacific's Tariff Rule12, Pacific must first provide information with respect to the service a customer inquires about and describe options for purchasing this service beginning with the least expensive option.

Pacific's activities "does provide a reasonable check on" this possibility. (D.02-09-050, p. 252.)

With respect to section 709.2(c)(3), in D.02-09-050 we addressed allegations that Pacific will improperly subsidize PBLD through its proposed joint marketing plan.[4] We required Pacific to track *all* the time it spends marketing PBLD's services and report costs in Pacific's annual affiliate transaction report to the Commission. Also, we directed Staff to audit Pacific's joint marketing activities as part of the next scheduled audit in compliance with sections 314.5 and 797 of the Public Utilities Code. In D.02-09-050, we stated that we could not find that "there is no possibility of improper cross-subsidization" but also concluded that our requirements for "separate accounting records and for the examination of the cost allocation methodology for the provisioning of intrastate interexchange telecommunications service", pursuant to our affiliate transaction and cost allocation rules and other auditing requirements, "will be integral in preventing, identifying and eliminating improper cross-subsidization". (D.02-09-050, p. 258.)

With respect to section 709.2(c)(4), in D.02-09-050 we stated that we could not "unequivocally" find that Pacific's entry into the long distance market in California "will primarily enhance the public interest". (D.02-09-050, p. 263.) Accordingly, we directed Pacific to prepare in six months a study on the feasibility of structurally separating its retail marketing services and wholesale network operations and divesting the latter segment. Also, we directed Staff to prepare in five months an investigation to examine the feasibility of selecting an independent PIC administrator for

[4] In its joint marketing proposal, Pacific only planned on tracking marketing activities that resulted in a customer signing up for long distance service with PBLD. By tracking the information in this manner, Pacific would not have been able to allocate all joint marketing costs to PBLD.

California. In D.02-09-050, we found that the Tariff Rule 12 marketing restraints we imposed on Pacific and the requirement for Pacific to track and report its joint marketing activities and for Staff to audit these activities "are sufficient to protect customers from unwanted and abusive marketing, and to prevent harm to California's intrastate interexchange telecommunications market due to cross-subsidy". (D.02-09-050, p. 267.)

Additionally, in D.02-09-050, we established two other safeguards. We directed Pacific and other parties to create a joint proposal for an expedited dispute resolution ("EDR") process. The purpose of the EDR process is to resolve operational problems arising between Pacific and CLECs. Also, we directed Staff to review and approve Pacific's joint marketing scripts to ensure that they meet the marketing requirements we set forth in D.02-09-050.

On October 4, 2002, Commissioner Geoffrey F. Brown, the Assigned Commissioner in this proceeding, issued a ruling (herein the "October ACR"). In this ruling, Commissioner Brown asked parties to assess the existing record and determine whether the Commission needed to augment it in order to make the remaining three determinations of section 709.2(c). In the October ACR, Commissioner Brown asked parties to discuss: whether the Commission needed to conduct further proceedings, and if so, what issues remained outstanding; whether performance incentives and the existing safeguards mitigated present and potential competitive harms and, if not, what additional measures were needed; how long should safeguards, such as the joint marketing protections, apply to Pacific; and whether section 709.2(c) required that the Commission make discrete findings, at the point Pacific enters the intrastate long distance market, or

whether this provision imposed ongoing obligations on the Commission. Responses to the October ACR were due on October 15.

On November 6, 2002, Commissioner Brown and Administrative Law Judge ("ALJ") Jacqueline A. Reed, the assigned ALJ to this proceeding, held a prehearing conference. During this conference, ALJ Reed urged parties to collaborate on an EDR process proposal and provided parties an opportunity to further express their views on how the Commission should resolve the issues remaining under section 709.2(c). Additionally, ALJ Reed invited parties to supplement their oral remarks with written comments, to be filed by November 14. ALJ Reed released a proposed decision on December 12; comments on the proposed decision were due by December 24. The Commission voted out the proposed decision, which became D.02-12-081, on December 30.

In D.02-12-081, we concluded that conducting evidentiary hearings would be against the public interest in this case. We also found that evidentiary hearings were unnecessary because there were no material disputed factual issues that would require resolution through evidentiary hearings. Further, we also established the following three safeguards. First, we directed Staff to continue to review Pacific's joint marketing scripts, when Pacific makes substantial changes to them. Second, we directed the Commission and parties to adopt as quickly as possible an EDR proposal. Third, we directed parties, within six months, to create a special access services performance database and to review proposed and existing special access measures in order to reach a comprehensive set of performance measures; we also directed Pacific to report its current

special access performance results, pending the adoption of a final performance measurement plan.

In D.02-12-081, we made the remaining three determinations of section 709.2(c) as follows. There, we found that with the safeguards we added, the section 709.2(c)(2) mandate can be met. In D.02-12-081, we concluded that the determination mandated by section 709.2(c)(3) can be made in light of existing federal and state accounting and other auditing requirements already in place. With respect to section 709.2(c)(4), we found that the possibility of harm to the competitive intrastate long distance market is "less than substantial" in light of the safeguards we added in this decision and those we already mandated in D.02-09-050. (D.02-12-081, p. 25.)

The California Association of Competitive Telecommunications Companies, Competitive Telecommunications Association, Association of Communications Enterprises, the Commission's Office of Ratepayer Advocates, The Utility Reform Network, Pac-West Telecomm, Inc. and Working Assets Long Distance (collectively "Joint Applicants") filed an application for rehearing of D.02-12-081. Joint Applicants contend that the decision: violated the hearing requirements of section 709.2(c); ignored allegations that Pacific's switched access service is excessively priced in violation of section 709.2(c)(4); violated the hearing requirements of section 1708; violated the substantial evidence standard of section 1757(a)(4); inappropriately relied on possible future regulatory programs in making the findings of section 709.2(c); violated Article I, section 7 of the California Constitution; and violated Article III, section 3.5 of the California Constitution. WorldCom, Inc. ("WorldCom"), Time Warner Telecom of California, L.P., Pac-West Telecomm, Inc. and the California Association of Competitive

Telecommunications Companies (collectively "WorldCom Applicants") also filed a joint application for rehearing of D.02-12-081. WorldCom Applicants contend that D.02-12-081, in the performance metric plan that is to be developed, should have included special access services Pacific provides under interstate tariffs.

Pacific filed a response to the rehearing applications. Among other matters, Pacific claims that we should defer to the FCC on interstate special access issues, section 1708 was not applicable, reliance on safeguards to make the section 709.2 determinations was appropriate and Pacific's switched access rates did not prohibit us from making the determination mandated by section 709.2(c)(4).

II. DISCUSSION

We have carefully reviewed rehearing applicants' contentions and, as discussed below, have concluded that D.02-12-081 should be modified in certain respects and rehearing of the modified decision should be denied. In this decision, we find that, in D.02-12-081, we did not violate the public hearing process requirement of section 709.2(c) and that parties had an adequate opportunity to comment prior to our issuance of D.02-12-081. Also, we modify D.02-12-081 to address issues with respect to Pacific's pricing of switched access service and explain why the Commission can make the section 709.2(c)(4) determination in light of Pacific's switched access rates. Also, we find that in D.02-12-081 we did not violate the evidentiary hearing requirement of section 1708. Additionally, contrary to the arguments of rehearing applicants, there is substantial evidence in the record, as further explained in this decision, supporting our conclusion that there is no anticompetitive behavior by Pacific, no improper cross-subsidization of the intrastate long distance market and no substantial possibility of harm to the intrastate long distance market. We also find that, in D.02-12-081, we did not violate parties' due

process rights under California law or Article III, Section 3.5 of the California Constitution. Finally, we determine that WorldCom Applicants did not raise legal error in their application for rehearing. Accordingly, we deny rehearing of the decision, as modified herein.

A. Whether D.02-12-081 complied with the public hearing process.

According to Joint Applicants, the "public hearing process" language of section 709.2(c) mandates evidentiary hearings where there are disputed issues of material fact. Joint Applicants contend that we have routinely and uniformly used evidentiary hearings in order to resolve disputed factual issues and, thus, should have held evidentiary hearings here as well.

Here, the plain language of section 709.2(c) only refers to the "public hearing process" and not to evidentiary hearings. (Pub. Util. Code § 709.2(c).) Additionally, nothing in the legislative history of section 709.2 suggests that the Legislature intended by the "public hearing process" to require evidentiary hearings. Moreover, notwithstanding the above, Joint Applicants do not state what material facts they believe are in dispute. (Application for Rehearing of Joint Applicants, p. 6.) Thus, Joint Applicants have not set forth the specific grounds on which they believe D.02-12-081 errs, as is required by Public Utilities Code section 1732 and Rule 86.1 of the Commission's Rules of Practice and Procedure and, therefore, we reject Joint Applicants' argument for failing to comply with these provisions. Accordingly, Joint Applicants' argument that in D.02-12-081 we did not comply with the "public hearing process" of section 709.2 lacks merit.

Further, in D.02-12-081 we relied on safeguards in making the remaining three determinations. As discussed below, Joint Applicants argue that safeguards were not enough. However, contrary to Joint Applicants' arguments, reliance on safeguards does provide an appropriate basis to make the remaining three determinations. Section 709.2(c)(2) requires that we determine "there is no anticompetitive behavior". (Pub. Util. Code § 709.2(c)(2).) In enacting section 709.2, the Legislature said the "risk of unfair competition or *anticompetitive behavior* that might result from opening [the intrastate long distance] market to local telephone companies can be minimized by appropriate *regulatory safeguards*…". (Legislative Note (i), Pub. Util. Code § 709.2 [emphasis added].) Section 709.2(c)(3) requires that we determine that "there is no improper cross-subsidization of intrastate interchange telecommunications service *by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs*". (Pub. Util. Code § 709.2(c)(3) [emphasis added].) Thus, the plain language of the statute shows the Legislature contemplated that the Commission would make this determination by means of implementing safeguards. Section 709.2(c)(4) requires that we determine that "there is no substantial *possibility* of harm to the competitive intrastate interexchange telecommunications markets". (Pub. Util. Code § 709.2(c)(4) [emphasis added].) This determination is forward-looking and can reasonably be made by relying on safeguards. Moreover, construing section 709.2(c) as allowing us to make the remaining determinations by imposing safeguards is reasonable and consistent with section 709.2(c)'s clear goal of opening the intrastate long distance market to competition.

Accordingly, our reliance on safeguards to make the remaining determinations of section 709.2(c) was reasonable for all the reasons discussed above.

Joint Applicants also contend that, prior to issuing D.02-12-081, we only afforded parties two abbreviated rounds of comments, on the October ACR and draft decision, and that this process did not satisfy the "public hearing process" mandated by section 709.2(c). As a preliminary matter, we afforded parties four opportunities to comment after the issuance of the October ACR and prior to issuing D.02-12-081. We allowed parties to comment in response to the October ACR, at the November 6 prehearing conference, in additional comments Judge Reed allowed parties to file after the prehearing conference and in comments on Judge Reed's proposed decision. Moreover, as discussed above, section 709.2(c) only requires that we provide parties a "public hearing process" and does not specify what this process entails. Further, in this proceeding, we have afforded parties multiple opportunities to comment throughout the course of the proceeding. Even Joint Applicants acknowledge the many opportunities to comment that we have provided parties during this proceeding. As Joint Applicants state in their rehearing application:

> In the months of proceedings leading to [D.02-09-050], the Commission afforded interested parties and the public multiple pleading rounds, oral arguments, public participation hearings and also considered the broad record of the Section 271 proceeding, which included years of pleadings and workshops concerning relevant issues.

(Application for Rehearing of Joint Applicants , p. 6.) By providing multiple rounds of comments, we have complied with section 709.2(c) by affording parties a "public hearing process". Thus, Joint Applicants' argument that parties did not have an adequate

opportunity to comment here lacks merit. Accordingly, Joint Applicants have not demonstrated legal error on the issue of whether we provided a public hearing process.

B. Whether D.02-12-081 appropriately made the finding of section 709.2(c)(4) in light of Pacific's switched access rates.

Joint Applicants argue that Pacific's switched access rates are anticompetitive and that, in light of these rates, we did not appropriately make the finding mandated by section 709.2(c)(4). Joint Applicants maintain that the "factual evidence" in the record reflects that Pacific's intrastate switched access rates are priced at twice the economic cost of providing the service, Pacific's intrastate switched access rates are nearly double the rates in Pacific's interstate access tariff and the Network Interconnection Charge ("NIC") component of Pacific's switched access rates is not cost-based. (Rehearing Application of Joint Applicants, p. 8.) Joint Applicants argue Pacific's switched access rates are discriminatory because Pacific's competitors have to pay Pacific high access charges but access charges PBLD will pay to Pacific will stay "within the same corporate family". (*Id*. p. 9.) Joint Applicants maintain that Pacific's switched access rates allow Pacific "to accrue unreasonable, excessive monopoly profits". (*Id*.)

Joint Applicants' claims do not support a finding that Pacific's switched access rates present a substantial possibility of harm to the competitive intrastate long distance market. Joint Applicants have not provided factual data that would allow us to determine whether the allegations they make about Pacific's switched access rates are correct. Nor do they define what constitutes monopoly profit. Contrary to Joint Applicant argument, Pacific's switched access rates are not anticompetitive simply because they may not be directly tied to the cost of providing switched access service.

We have recognized in past decisions that, under the regulatory structure we have created, access rates are used to recover costs of maintaining network elements that are not directly tied to a specific service. (See D.95-12-020, stating that the NIC is not cost based and is not associated with the costs of any specific transport function.) Moreover, because Pacific incurs the costs of maintain its network (which its competitors rely on for providing service), and uses revenue derived from its access charges to recover these costs, it is unlikely that Pacific would be able to accrue monopoly profits through its switched access rates. Further, in past proceedings we have found Pacific's switched access rates to be just and reasonable. For example, in D.94-09-065, we comprehensively examined Pacific's switched access rates. In D.95-12-020, we approved a settlement establishing the NIC. Also, in D.98-05-020, we dismissed a complaint alleging that Pacific's switched access rates were discriminatory and unlawful and allowed Pacific to accrue excessive monopoly profits. Accordingly, Joint Applicant's argument that we cannot make the determination mandated by section 709.2(c)(4) in light of Pacific's switched access rates lacks merit.

Also, contrary to Joint Applicants' arguments, Pacific's intrastate switched access rates need not be identical in form or amount to those set by the FCC with respect to Pacific's interstate switched access rates. No provision requires that Pacific's intrastate switched access rates be at par with its interstate rates before the Commission can make the finding mandated by section 709.2(c)(4).[5] All that the Commission must do is find that rates are just and reasonable. (Pub. Util. Code §§ 451, 455 and 728.) And, the Commission has broad discretion to determine what constitutes a just and reasonable

[5] Moreover, the section 709.2 proceeding would not be the appropriate proceeding to adjust Pacific's switched access rates.

rate. (See *Henry Wood v. Public Utilities Commission* (1971) 4 Cal. 3d 288, 295.) In any event, we have opened a proceeding, Rulemaking 03-08-018, to address topics relating to the level of Pacific's intrastate switched access charges, in recognition that circumstances in the telecommunications industry have changed since we last comprehensively reviewed Pacific's intrastate switched access rates. Moreover, this proceeding will look into allegations that Pacific's pricing of switched access service creates the potential for a price squeeze and, thus, those rates are anticompetitive. (Rulemaking 03-08-018, pp. 5-6.)

For the reasons we discuss above, Pacific's switched access rates do not pose a substantial threat to the competitiveness of the intrastate long distance market and did not prevent us from making the determination mandated by section 709.2(c)(4). However, as Joint Applicants state in their rehearing application, in D.02-12-081 we did not address allegations that Pacific's pricing of switched access service is anticompetitive. Accordingly, by this decision, we will modify D.02-12-081 to clarify that Pacific's pricing of switched access service is not anticompetitive and does not prevent us from making the determination mandated by section 709.2(c)(4), pursuant to our discussion above.

C. Whether D.02-12-081 appropriately issued without conducting evidentiary hearings.

According to Joint Applicants, D.02-12-081 unlawfully ignores the hearing requirement of section 1708. This section provides, in part, that the Commission "may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints rescind, alter, or amend any order or decision made by it". (Pub. Util. Code § 1708.) Joint Applicants argue that in D.02-12-081 we rescinded and

reversed many of the findings and conclusions we reached in D.02-09-050 relating to section 709.2(c). Also, they argue that the written comments we permitted before issuing D.02-12-081 did not afford parties an opportunity to be heard as provided in the case of complaints (i.e., through evidentiary hearings). Further, Joint Applicants maintain that evidentiary hearings were necessary in light of the holding of the California Supreme Court in *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal. 3d 240. There, the Court said:

> The phrase 'opportunity to be heard' [in section 1708] implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal. The recommendation to cancel the rates was based upon factual determinations made by the staff of the commission

(*California Trucking Association*, 19 Cal. 3d at 244.)

California Trucking Association, cited to above, stands for the proposition that where there are disputed factual contentions an opportunity to submit written argument is not enough to meet the requirements of section 1708. In the instant proceeding, a review of the record shows that there were no disputed factual issues requiring resolution through an evidentiary hearing. Although parties did dispute the issue of whether Pacific's pricing of switched access service creates the potential for an anticompetitive price squeeze, this issue relates to economic facts, which do not need to be resolved through evidentiary hearings. *(*Davis & Pierce, *Administrative Law Treatise* (Third Edition, 2000 Cumulative Supplement) § 8.3, citing to *SBC Communications, Inc v. Federal Communications Commission* (1995) 56 F.3d 1484, 1497; and D.94-04-042, 54 CPUC 2d 43, 50.) Moreover, as we discuss above, in D.02-12-081 we appropriately relied on safeguards in reaching the remaining three determinations of section 709.2(c).

Thus, Joint Applicants have not demonstrated legal error on the issue of whether evidentiary hearings were required in light of section 1708.

D. Whether there is substantial evidence in the record.

Joint Applicants argue that D.02-12-081 is unlawful because its findings and conclusions are not supported by substantial evidence in light of the whole record in violation of section 1757(a)(4).[6] In their rehearing application, Joint Applicants make specific arguments with respect to D.02-12-081's conclusion that there is no improper cross-subsidization. On the issue of improper cross-subsidization, Joint Applicants maintain that the record reflects that 1) Pacific cross-subsidizes PBLD's services through Pacific's sales channel, 2) Pacific's pricing of the 800 database access rate element is anti-competitive and results in cross-subsidization of Pacific's own competitive interexchange 800 service offering and 3) Pacific's intrastate switched access rates include the non-cost based NIC component.

Joint Applicants' arguments as to why D.02-12-081 incorrectly concluded that there is no improper cross-subsidization lack merit. Contrary to Joint Applicants' arguments, the record that Joint Applicants point to does support a conclusion that there is no improper cross-subsidization by Pacific. With respect to Joint Applicant's first example of improper cross-subsidization, we already addressed cross-subsidy concerns with respect to Pacific's joint marketing plan in D.02-09-050. As we discuss above, in D.02-09-050 we directed Pacific to track all the time it spends marketing PBLD's services and report costs in Pacific's annual affiliate transaction report to the

[6] Joint Applicants also argue that D.02-12-081 violates the other provisions in section 1757, in addition to the one requiring that our decisions be based on substantial evidence in the record. Joint Applicants make these arguments without any specificity. (Application for Rehearing of Joint Applicants, p. 20.) Thus, we reject their arguments for failing to comply with Public Utilities Code section 1732 and Rule 86.1 of the Commission's Rules of Practice and Procedure.

Commission. The purpose of requiring Pacific to track and record all of its joint marketing activities was to ensure that Pacific could identify and be compensated for all its joint marketing efforts. Also, in D.02-09-050, we directed Staff to audit Pacific's joint marketing activities, as part of the next scheduled audit in compliance with sections 314.5 and 797 of the Public Utilities Code, in order to ensure that Pacific was being appropriately compensated for its all its joint marketing activities. In D.02-09-050, we concluded that these safeguards are sufficient to address concerns of improper cross-subsidization with respect to Pacific's joint marketing plans. Moreover, to the extent there is any confusion that all we required in D.02-09-050 was that Pacific just track and report its joint marketing activities, we clarify in this decision that Pacific is to track and report on all its joint marketing activities and PBLD is to reimburse Pacific for all joint marketing activities, and not just activities that result in a customer signing up for PBLD service.

Likewise, Joint Applicants have not established legal error with respect to their second example of alleged improper cross-subsidization, which is that Pacific's pricing of the 800 database access rate element is anti-competitive and results in cross-subsidization of Pacific's own competitive interexchange 800 service offering. On the issue of alleged improper cross-subsidization of Pacific's 800 services, Joint Applicants cite to comments filed by WorldCom. In its comments, WorldCom made two arguments as to why there is improper cross-subsidization by Pacific. First, WorldCom argued that Pacific fails to impute the 800 database query feature charge in its retail 800 service rate. However, Pacific is not required to impute the 800 database query feature in its toll price floors, which include that monopoly function. We have stated that imputation is only

required with respect to functions deemed to be monopoly building blocks. (D.89-10-031, 33 CPUC 2d 43, 121.) And, we have not found the 800 query feature to be a monopoly building block. Accordingly, WorldCom's first argument as to why there is improper cross-subsidization lacked merit.

Second, WorldCom argued that Pacific manipulates its access tariff so that it imposes no charge on itself for the POTS Translation feature of its 800 service. WorldCom claimed that Pacific's access tariff specifies a rate of zero for this feature that Pacific uses to provide its retail 800 service but which is a feature that other large interexchange carriers do not use. However, even if Pacific were obtaining some kind of cost advantage with respect to its provisioning of the POTS Translation feature, this advantage is not so significant that other local exchange carriers could not effectively compete against Pacific. Accordingly, there is no anticompetitive behavior with respect to Pacific's provisioning of 800 service. Thus, there was no merit to WorldCom's second argument, that Pacific should be denied entry into the intrastate long distance market, in light of WorldCom's argument of alleged improper cross-subsidization in the record with respect to the POTS Translation feature.

With respect to Joint Applicants' third example of alleged improper-cross subsidization, we have already discussed above why the existence of the NIC in Pacific's switched access rates does not make these rates anticompetitive or establish that there is improper cross-subsidization. Additionally, as part of our new rulemaking looking into issues with respect to the pricing of switched access service, we will be considering whether to maintain the NIC at is current levels or to reduce or eliminate it. (Rulemaking 03-08-018, p. 6.) Therefore, Joint Applicants' third example of alleged improper cross-

subsidization also lacks merit. Thus, Joint Applicants have not shown legal error on the issue of why D.02-12-081's conclusion that there is no improper cross-subsidization is incorrect and their argument that the record supports the conclusion that there is improper cross-subsidization by Pacific is unsubstantiated.

Joint Applicants also maintain that our conclusion in D.02-12-081 that there is no improper cross-subsidization is internally inconsistent with the statement in D.02-12-081 that "the current NRF proceeding, R.01-09-001, will determine in one of its phases whether or not Pacific has cross subsidized its operations". However, as we discuss below, in D.02-12-081 we appropriately made the finding mandated by section 709.2(c)(3). Because the above statement was not necessary to our determination, we modify D.02-12-081 to remove this language and thus eliminate any confusion it has created.

Further, Joint Applicants argue that D.02-12-081 is not supported by substantial evidence in the record because in D.02-09-050 we cited to specific examples of anticompetitive conduct by Pacific and these examples are inconsistent with our findings and conclusions of D.02-12-081. Also, Joint Applicants argue that we issued D.02-12-081 without accepting new evidence and thus could not have reached the findings and conclusions in D.02-12-081. Further, Joint Applicants argue that in D.02-12-081 we cited to new allegations of anticompetitive acts by Pacific and that in light of these new allegations, we should have reopened the record. These arguments lack merit.

Contrary to the Joint Applicants' arguments, the record does support our having made the remaining three determinations of section 709.2(c). We have reviewed and reconsidered Pacific's showing in this proceeding, parties' comments to that

showing, and our conclusions in D.02-09-050. Below, we discuss why it was reasonable for us, based on the record in this proceeding, to find, as we did in D.02-12-081, that Pacific had met the remaining section 709.2(c) determinations. Moreover, as discussed above, our decision to conclude the section 709.2 proceeding without holding evidentiary hearings, and to rely on safeguards to make the remaining three determinations, was reasonable and within our legal authority. Further, as discussed below, the new allegations of anticompetitive behavior against Pacific that parties made in response to the October ACR lacked merit. Therefore, not only were evidentiary hearings not required, to conduct them would have wasted resources of the parties and the Commission.

Moreover, we point out that Joint Applicants' arguments are inconsistent with comments made by parties in this proceeding. In comments, parties argued that we can conclude the section 709.2 proceeding based on the existing record and without conducting further proceedings. In comments, parties also argued that we can make the remaining three determinations by imposing safeguards. Moreover, parties' comments reflect that there were diverse views on what additional safeguards we should adopt in order to conclude the section 709.2 proceeding. The decision of which safeguards to adopt is a policy matter within our discretion. Further, many parties in this proceeding, including parties that are among the Joint Applicants, supported the additional safeguards we adopted in D.02-12-081. Also, Joint Applicants fail to point out that most of the safeguards we relied on in D.02-12-081, were initially set forth in D.02-09-050. In that decision, we found the safeguards we adopted in D.02-09-050 to be adequate in

preventing anticompetitive behavior by Pacific, and this determination was not challenged on rehearing.

1. Examples of anticompetitive conduct cited to in D.02-09-050 did not prevent us from making the determinations mandated by section 709.2(c).

As we discuss above, in D.02-09-050 we found that Pacific had made a showing that it complies with twelve of the fourteen competitive requirements imposed by the Telecommunications Act of 1996. In D.02-09-050, we also found that Pacific had not complied with Checklist Item 11, with respect to number portability. On this issue, we required that Pacific implement a mechanized enhancement to the Number Portability Administration Center ("NPAC"). (D.02-09-050, p. 200.) Pacific implemented the NPAC prior to our issuing D.02-12-081. Therefore, the concerns with respect to Checklist Item 11 were moot.

Also, in D.02-09-050 we found that Pacific had not fully complied with Checklist Item 14, with respect to resale, because it had shut competition out of its advanced services markets. (D.02-09-050, p. 220.) However, in D.02-09-050, we also found that Pacific had otherwise satisfied its legal obligation to make retail telecommunications services available for resale to CLECs at wholesale rates. (*Id.*) Nonperformance in this one limited area with respect to advanced services is not so significant that other local exchange carriers could not effectively compete against Pacific. Therefore, it would have been inappropriate for us to withhold Pacific's entry into the instate long distance market on this issue alone. Accordingly, Pacific's performance in the advanced services markets did not prevent us from making the determinations mandated by section 709.2(c).

In D.02-09-050, we also found anticompetitive conduct, in violation of section 709.2(c)(2), in light of evidence in the record of two lawsuits against Pacific. (D.02-09-050, pp. 247-248.) One lawsuit, which was filed in 1996, sought a preliminary injunction to prevent Pacific from using long distance carriers' billing information in connection with a Pacific promotional program. The other lawsuit was filed in 1997 and alleged that Pacific was unlawfully monopolizing the local exchange market. However, as we stated in D.02-09-050, these cases were settled, and no judgment was entered against Pacific. Thus, these cases are not proof of anticompetitive conduct by Pacific. Also, in D.02-09-050 we noted that, because these cases concerned conduct by Pacific dating to as early as 1996 and 1997, these cases may be outdated and no longer relevant to this proceeding. These cases are too old to be of any value here. Accordingly, for the reasons we discuss above, these two cases did not prevent us from making the determination mandated by section 709.2(c)(2).[7]

Also, in D.02-09-050 we were concerned with evidence of payment obligations by SBC relating to requirements resulting from its merger with Ameritech Corporation. (D.02-09-050, p. 252.) In D.02-09-050, we considered evidence of SBC's payment obligations as potentially reflecting that Pacific may behave in an anticompetitive manner in the future in light of a pattern of behavior by SBC of not meeting performance obligations. Nevertheless, accrued payment obligations do not necessarily reveal an intentional disregard by SBC in meeting obligations to CLECs. Accordingly, accrued payment obligations in and of themselves do not constitute anticompetitive behavior. Nor do they suggest that Pacific will behave in an

[7] Moreover, we point out that the FCC reached the same conclusion with respect to these two cases in its review of Pacific's application to provide intrastate long distance service. (FCC 02-330 [2002 FCC LEXIS 6809] para. 172 adopted December 19, 2002.)

anticompetitive manner in the future. Moreover, to the extent these payment obligations relate to performance by SBC in other states, and not California, they are irrelevant to this proceeding.

Also, in D.02-09-050 we took official notice of a consent degree resulting in fines against SBC relating to Section 271 applications involving Missouri, Oklahoma and Kansas. (D.02-09-050, p. 246.) For the reasons we discuss above, these fines are not relevant to this proceeding because they relate to SBC's performance in other jurisdictions and not to California.

In D.02-09-050, we were concerned with the fact that Pacific would continuing in its role as the PIC administrator, as this fact pertained to the determination we needed to make with respect to section 709.2(c)(4). Specifically, we expressed concern with the results of an audit looking into slamming allegations, conducted by our Consumer Services Division ("CSD"), indicating that there are problems with Pacific's reporting of local toll PIC ("LPIC") disputes. (D.02-09-050, pp 261-262.) However, subsequently, in D.02-10-006, we found that the slamming allegations at issue in this audit arose out of billing disputes and that parties had resolved these disputes. Further, in D.02-10-006, we found 1) there were no allegations that the allegedly slammed customers ever paid a higher rate than the customers otherwise would have paid as a result of the alleged slam, 2) the CSD audit report found no intentional slamming of customers and 3) it was premature to open an investigation into Pacific's LPIC process in light of the above findings. Moreover, in D.02-12-081, we explained that it was important, for purposes of public policy, to carefully consider the costs that would be associated with implementing independent PIC administration and structural separation,

and not to rush into these measures, if at all. (D.02-12-081, p. 13.) In light of the above discussion, it is clear that concerns with respect to potential harm to the in-state long distance market in light of the findings of the CSD audit were unwarranted. Moreover, the investigation we intend to open will determine whether it is even feasible to select independent PIC administrator for California.

Also, in D.02-09-050 we expressed concern with Pacific's market share in the local market, as it pertained to our ability to make the determination mandated by section 709.2(c)(4). (D.02-09-050, p. 263.) However, with respect to CLEC market share, Pacific has said that CLECs: 1) already serve at least 2 million customers in California and that CLECs' existing collocation arrangements allow them to serve a large percentage of Pacific's customers, 2) already serve millions of customers through their own facilities and 3) serve more than 537,000 residential lines in Pacific's serving area, including 375,000 of which are served over CLEC facilities. (June 27, 2001 Renewed Motion of Pacific, pp. 9-10.) The above numbers reflect that the local market in California is open to competition. Accordingly, issues with respect to CLEC market did not prevent us from making the determination mandated by section 709.2(c)(4).

Further, in D.02-09-050, we expressed concern with the issue that PBLD could have a significant advantage over other competitors because Pacific would be able to market PBLD's services to its millions of customers during incoming customer service calls, as this issue pertained to the determination we needed to make pursuant to section 709.2(c)(4). (D.02-09-050, p. 262.) However, as we discuss above, in D.02-09-050 we 1) prohibited Pacific from marketing its optional or affiliate services during a new phone line installation unless the customer specifically requests this service, 2) required that

Pacific inform customers of their right to select a long distance carrier of their choice, prior to stating that Pacific also offers long distance service, and provide customers with an opportunity to select an alternate long distance provider and 3) adopted language to be included in joint marketing scripts, which Staff was to review. Moreover, in D.02-12-081, we refined the language that is to be included in Pacific's joint marketing scripts and directed Staff to continue to review Pacific's joint marketing scripts. These safeguards will offset, to a significant extent, advantages Pacific will have in light of its ability to market PBLD's services. Because these safeguards are in place, it was reasonable to conclude that Pacific's entry would not pose a substantial possibility of harm to the competitive instate long distance market even though Pacific would be able to market PBLD's services to its customers.

2. New allegations of anticompetitive conduct did not prevent us from making the determinations mandated by section 709.2(c).

In D.02-12-081, we stated that parties had argued that we should open the record to consider the findings made in the Regulatory Audit of Pacific for the Years 1997, 1998 and 1999 conducted by the Overland Consulting Group. (D.02-12-081, p. 8.) However, we have not formally adopted this audit. Therefore, we did not need to accord the audit any weight in this proceeding. Accordingly, the results of the audit report did not prevent us from making the determination mandated by section 709.2(c).

Also, in D.02-12-081 we stated that parties had argued that we should open the record to consider new allegations that Pacific is evading regulatory performance monitoring by moving functionality away from organizations or processes covered by existing performance measures. (D.02-12-081, p. 8.) For example, AT&T argued that Pacific has moved functionality by shifting responsibility for CLEC support

from the Local Service Center to the Mechanized Customer Production Support ("MCPS") Center. (October 15, 2002 comments of AT&T, pp. 9-10.) However, through this argument, AT&T did not show that Pacific evades performance measurements. Pacific remains subject to performance reporting and penalty requirements for service provided through the MCPS Center. AT&T also argued that Pacific will be returning some jeopardy notices through Pacific's website rather than through the LEX or EDI ordering interfaces. (*Id*.) However, under current performance measurements, Pacific must report the number of jeopardy notices it sends, and how much lead time it gives for each type of service ordered by CLECs, irrespective of how the notice is sent. (D.01-05-087, Appendix C, OSS OII Performance Measurements 5 and 6.) Accordingly, AT&T's argument that Pacific is evading regulatory performance monitoring lacked merit.

Also, in D.02-12-081 we stated that one party, Telscape Communications, Inc., argued that we should open the record to consider evidence that Pacific allegedly engages in anticompetitive win-back practices against it. (D.02-12-081, p. 9.) However, we are currently considering these allegations in a pending proceeding and, thus, did not address them in D.02-12-081. (See Complaint 02-11-011.)

3. Other allegations made by parties in this proceeding did not prevent us from making the determinations mandated by section 709.2(c).

In this proceeding, parties alleged that Pacific unilaterally discontinued access to the CESAR system and, thus, disadvantaged CLECs.[8] (D.02-09-050, p. 246.) However, the record reflects that issues with respect to access to the CESAR system were promptly resolved. (See August 23, 2001 Affidavit of Ethan Sprague on Behalf of Pac-

[8] The CESAR is an on-line system that has been used in processing PIC assignments.

West Telecomm, Inc., p. 6, indicating that issues with respect to access were resolved within a matter of two weeks.) Moreover, parties did not state that they had no other way of processing PICs during this brief period were they allegedly had no access to the CESAR system. Accordingly, issues concerning access to the CESAR system did not constitute anticompetitive behavior by Pacific and did not prevent us from making the determinations mandated by section 709.2(c).

Also, parties argued that the alleged discontinuation of access to the CESAR showed how Pacific can "undercut" competitors' capability to provide service to new end users and, thus, harm competition in the instate long distance market. (August 23, 2001 Affidavit of Ethan Sprague on Behalf of Pac-West Telecomm, Inc., p. 7.) However, these allegations are speculative. Accordingly, we did not need to accord them any weight here.

Parties alleged that Pacific did not address various deficiencies in the CLEC forum and that this constituted anticompetitive behavior by Pacific in violation of section 709.2(c)(2). (D.02-09-050, p. 246.) In April 2001, we held hearings to consider Pacific's performance in provisioning of OSS services to CLECs. In D.02-09-050, we found that most of the performance issues that were identified in the April hearings had been resolved. Moreover, in D.02-09-050 we found that Pacific had "made meaningful and steady quantitative progress" toward resolving the outstanding issues. (*Id*., 107.) Accordingly, Pacific's performance in the CLEC forum did not reflect anticompetitive behavior by Pacific and did not prevent us from making the determination mandated by section 709.2(c)(2).

Parties alleged that we could not make the finding mandated by section 709.2(c)(2) in light of Pacific's interconnection practices. For example, one party argued that Pacific limits competition by artificially gating interconnection trunks by CLEC per day and that this practice is anticompetitive. (See August 23, 2001 comments of AT&T, p. 32.) However, in D.02-09-050 we found that Pacific's policies with respect to interconnection are reasonable and not anticompetitive. (D.02-09-050, pp. 27-29.) Accordingly, Pacific's interconnection practices did not prevent us from making the determination mandated by section 709.2(c).

Also, parties alleged that Pacific's pricing of switched access service creates the potential for an anticompetitive price-squeeze in violation of section 709.2(c)(4). (D.02-09-050, p. 259.) For the reasons we discuss above, it is unlikely that Pacific could engage in a potential price squeeze in light of its pricing of switched access service. Accordingly, Pacific's switched access rates did not prevent us from making the determination mandated by section 709.2(c)(4). Moreover, as we state above, we have an open proceeding that will investigate the price squeeze allegation.

One party, the California Internet Service Provider Association ("CISPA"), alleged that Pacific's provisioning of Digital Subscriber Line Transport services is anticompetitive. (See August 23, 2001 Comments of CISPA.) However, these allegations were settled and, thus, are moot. (See D.03-07-032, approving a settlement to a complaint filed by CISPA.)

Additionally, parties alleged that SBC has raised rates in states where it has gained long distance entry. (See D.02-09-050, p. 247.) However, this allegation concerns SBC's performance in other jurisdictions and, thus, is not relevant to the

determinations mandated by section 709.2(c). Further, although not directly relevant here, there is discussion in the record reflecting that SBC's entry into the long distance market in other jurisdictions has resulted in lower instate long distance rates for customers. (See June 27, 2001 Renewed Motion of Pacific, p. 86, discussing discounts offered by competitors in light of SBC's entry into the long-distance market in Texas.)

4. Whether D.02-12-081 appropriately relied on safeguards.

Joint Applicants maintain that to meet the mandates of section 709.2(c) we must make determinations with respect to the actual factual circumstances as they relate to each of the determinations required by section 709.2(c). Joint Applicant argue that we cannot rely, on what Joint Applicants have termed, "future" safeguards to make the determinations mandated by section 709.2(c) because "future" safeguards may not be implemented or may not accomplish their intended purpose. (Application for Rehearing of Joint Applicants, p. 25.) For the reasons we discuss below, these arguments lack merit.

As we have discussed above, there is a reasonable basis for concluding this proceeding and making the remaining three determinations of section 709.2(c) in light of specific factual circumstances that we have considered and reconsidered in this proceeding. Also, reliance on safeguards provides an appropriate basis to make the remaining three determinations of section 709.2(c), contrary to Joint Applicants' arguments. Moreover, in D.02-12-081 we did not rely solely on "future" safeguards. We also relied on a number of safeguards that were in effect the moment Pacific started providing instate long distance service, including: our continued review of Pacific's joint marketing scripts when Pacific makes substantial changes to these scripts, our review of

Pacific's performance with respect to existing special access performance measurements until the special access database is created, the marketing restrictions mandated for Pacific with respect to the application of Tariff Rule 12 and the direction to Pacific to track and record all joint marketing activities.

Further, in D.02-12-081 we reasonably found that the additional safeguards we relied upon will be effective in preventing anticompetitive behavior by Pacific. These safeguards are the establishment of the EDR process and a special access database, the future audit of PBLD and investigating the feasibility of implementing independent PIC administration and structurally separating Pacific's wholesale and retail operations. Most of these safeguards are based on existing proposals or measures made or supported by many parties in this proceeding. Moreover, we have found that anticompetitive activity by Pacific can be addressed through the enforcement of Commission rules and oversight of Pacific's activities.

Also, section 709.2(c)(3) specifically imposes a duty on us to implement certain safeguards in order to determine that there is no cross-subsidization of the instate long distance market. These safeguards are: 1) "requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service" and 2) "examining the methodology of allocating those costs". (Pub. Util. Code § 709.2(c)(3).) In D.02-12-081, we found that "[f]ederal and California law requires separate accounting records 'to allocate costs for the provision of intrastate interexchange telecommunications service'". (D.02-12-081, p. 25.) No rehearing applicant challenged this determination. Accordingly, we have established the first safeguard mandated by section 709.2(c)(3).

With respect to the second safeguard mandated by section 709.2(c)(3), in D.02-12-081 we stated that the audit of PBLD, that we directed to take place in D.02-09-050, "shall include an examination of the methodology of allocating intrastate interexchange telecommunications services costs". (D.02-12-081, p. 25.) Moreover, we have already adopted general cost methodology rules. (See D.89-10-031, adopting rules established by the FCC.) Thus, we have established the second safeguard mandated by section 709.2(c)(3). We modify D.02-12-081 to clarify that we have in place a costing methodology for the allocation of costs for the provision of telecommunications service.

5. Whether D.02-12-081 violated parties' due process rights.

Joint Applicants contend that by failing to conduct evidentiary hearings prior to issuing D.02-12-081, we violated parties' due process rights under California Constitution Article I, section 7. The California Supreme Court has held that due process does not require a hearing "that serves no useful purpose". (*City of Los Angeles v. Public Utilities Commission* (1975) 15 Cal. 3d 680, 703.) Joint Applicants failed to present material disputed facts that would have required resolution through an evidentiary hearing. Accordingly, Joint Applicants have not established legal error on this issue.

6. Whether D.02-12-081 violated the California Constitution

According to Joint Applicants, in D.02-12-081 we violated Article III, section 3.5 of the California Constitution because we failed to enforce the hearing requirement of sections 709.2 and 1708 and make substantive determinations based on evidence in the record. Joint Applicants argue that we issued D.02-12-081 "solely because of the timing of the FCC's related action [with respect to Pacific's application to the FCC to provide intrastate long distance service] taken under the 1996

Telecommunications Act, a federal law". (Application for Rehearing of Joint Applicants, p. 27.) Joint Applicants maintain the above is reflected in our justification for why we shortened the notice and comment period to the draft decision that became D.02-12-081. These arguments lack merit.

Article III, section 3.5 provides, in part:

> An administrative agency, including an administrative agency created by the Constitution…has no power:
>
> …(c) To declare a statute unenforceable, or to refuse to enforce a statue on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(California Constitution, Article III, Section 3.5.) Article III, Section 3.5 is not implicated here because in D.02-12-081 we did not declare a statute unenforceable or refuse to enforce a statute on the basis of federal law. As discussed above, we were not legally required to conduct evidentiary hearings prior to issuing D.02-12-081 and reasonably relied on safeguards in making the remaining three determinations of section 709.2(c). Also, we have the discretion to shorten the notice and comment period to our decisions. Considering timelines set by federal agencies in running our proceedings is not an abuse of this discretion nor does it violate Article III, Section 3.5 of the California Constitution. Moreover, no harm has resulted from the shortening of the notice and comment period because parties in this proceeding had an adequate opportunity to comment. Accordingly, Joint Applicants' argument lacks merit.

7. Whether D.02-12-081's special access database plan is appropriate.

WorldCom Applicants argue that we should reconsider our decision to exclude special access services provided under Pacific's interstate tariffs from the

performance metrics plan that is to be developed pursuant to D.02-12-081. According to the WorldCom Applicants, there is no jurisdictional bar to requiring reporting of interstate special access services and other states have required such reporting. Also, WorldCom Applicants argue that there are important policy and public interest reasons to keep track of the interstate data.

Contrary to the assertions of WorldCom Applicants, our decision in D.02-12-081 not to track access service provided through interstate tariffs is not "procedurally improper" or "legally erroneous". (WorldCom Applicants' rehearing application, p. 2.) Nor do WorldCom Applicants cite to any law or procedure that we violated in D.02-12-081 by only requiring the tracking of intrastate special access service. In the absence of any legal requirement, we find that the decision to exclude the reporting of special access service in the metrics plan to be developed is a policy judgment within our discretion. Accordingly, there is no legal error on this issue. Policy arguments are not appropriately raised in an application for rehearing, which is the vehicle for specifying legal error in Commission decisions. Therefore, we deny WorldCom's application for rehearing on this ground.

III. CONCLUSION

We modify D.02-12-081 pursuant to the discussion above. The rehearing applicants have failed to demonstrate any factual or legal error in D.02-12-081, as modified, and rehearing is denied.

THEREFORE, IT IS ORDERED that:

1. D.02-12-081 is modified to add the following text to the end of the first full paragraph on page 13:

"Moreover, with respect to switched access service, parties have alleged that Pacific's switched access rates are priced at twice the economic cost of providing the service and are nearly double the rates in Pacific's interstate access tariff and that the Network Interconnection Charge component of Pacific's switched access rates is not cost-based. Parties have alleged that, because Pacific's switched access rates are priced above the cost of providing the switched access service, these rates create the potential for an anticompetitive price squeeze and allow Pacific to accrue unreasonable monopoly profits. Parties' claims in this proceeding do not support a finding that Pacific's switched access rates present a substantial possibility of harm to the competitive intrastate market. In the past, we have found Pacific's switched access rates to be just and reasonable. Moreover, under the regulatory structure we have created, access rates include costs associated with maintaining network elements that are not directly tied to a specific service. Because Pacific incurs the costs of maintaining the network, and uses revenue derived from its access charges to recover these costs, it is unlikely that Pacific would be able to engage in a price squeeze or accrue monopoly profits in light of its switched access rates. Further, Pacific's intrastate switched access rates need not be identical in form or amount to those set by the FCC with respect to Pacific's interstate switched access rates."

2. D.02-12-081 is modified to delete the first two sentences in the first full paragraph on page 25.

3. D.02-12-081 is modified, for purposes of clarification, to add the following sentence after the third sentence in the first full paragraph on page 25:

"Also, we have in place a costing methodology for the allocation of costs for the provision of telecommunications service".

4. D.02-12-081 is modified to add the following Finding of Fact 15:

"Parties have alleged that Pacific's switched access rates are priced at twice the economic cost of providing the service and are nearly double the rates in Pacific's interstate access tariff and that the Network Interconnection Charge component of Pacific's switched access rates is not cost-based."

5. D.02-12-081 is modified to add the following Finding of Fact 16:

"Parties' claims in this proceeding with respect to Pacific's pricing of switched access service do not support a finding that Pacific's switched access rates present a substantial possibility of harm to the competitive intrastate market."

6. D.02-12-081 is modified to add the following Finding of Fact 17:

"It is unlikely that Pacific could engage in a price squeeze or accrue monopoly profits as a result of its pricing of its switched access rates."

7. D.02-12-081 is modified to add the following Conclusion of Law 16:

"Pacific's switched access rates do not prevent the Commission from making the determination mandated by section 709.2(c)(4)."

8. D.02-12-081, Conclusion of Law 22, is modified to add the following words at the end of that sentence:

" and also establishes a costing methodology for the allocation of costs for the provision of intrastate interexchange telecommunications service".

9. Rehearing of D.02-12-081, as modified, is denied.

This order is effective today.

Dated November 13, 2003 at San Francisco, California

MICHAEL R. PEEVEY
President
CARL W. WOOD
SUSAN P. KENNEDY
Commissioners

Commissioner Geoffrey F. Brown, being necessarily absent, did not participate.

I dissent.

/s/ LORETTA M. LYNCH
Commissioner